IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

ROBERT SCHMIDT, Plaintiff, VS. BARTECH GROUP, INC., et al., Defendants.	Civil No. 14-cv-112 September 26, 2014

MOTIONS HEARING

BEFORE: THE HONORABLE GERALD BRUCE LEE
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF: COOK CRAIG & FRANCUZENKO PLLC
BY: JOHN C. COOK, ESQ.

FOR THE DEFENDANTS: CHRISTIAN & BARTON LLP
BY: ROMAN LIFSON, ESQ.

REED SMITH LLP
BY: HELENANNE CONNOLLY, ESQ.

OFFICIAL COURT REPORTER: RENECIA A. SMITH-WILSON,RMR, CRR
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(Thereupon, the following was heard in open court at 10:35 a.m.)

THE CLERK: 1:14 civil 112, Robert Schmidt versus Bartech Group, Incorporated, et al.

Would counsel please note your appearances for the record.

MR. COOK: Good morning, Your Honor. John Cook on behalf of the plaintiff.

THE COURT: Good morning.

MR. LIFSON: Good morning, Your Honor. Roman Lifson on behalf of defendant, the Bartech Group.

THE COURT: Good morning.

MS. CONNOLLY: Good morning, Your Honor. Helen Connolly on behalf of Verizon Corporate Services Group, VCSG.

THE COURT: Good morning.

You may proceed.

MR. LIFSON: Thank you, Your Honor. Good morning again.

As I mentioned, I represent the Bartech Group which is one of the two defendants in this case.

Ms. Connolly represents Verizon. We filed a joint motion for summary judgment, and Ms. Connolly and I have agreed to divide the argument in the following way. I'll deal with the FLSA claim and the breach of contract

claim that's been filed against Bartech and then Ms. Connolly will deal with the retaliation claim and the *Bowman* claim as well.

THE COURT: All right.

MR. LIFSON: Your Honor, our briefs contain a lot of the undisputed facts, and I certainly will not reiterate all of those. But I do want to start with summarizing what we think are the key undisputed facts pertaining to the motion for summary judgment.

THE COURT: I understand that's your preference. My preference would be for you to state the issues first before you start the facts.

MR. LIFSON: Okay, very well. The issues pertaining to part of the argument that I'm covering are has -- is summary judgment appropriate on Mr. Schmidt's FLSA claim, meaning does he have a claim under the Fair Labor Standards Act or is his claim simply a -- a breach of contract claim?

And the second issue that I'm covering is pertaining to Count III which he's asserted, which he phrases in the alternative, a breach of contract claim against Bartech on which we also feel that there is -- summary judgment should be entered in favor of Bartech on that --

THE COURT: So, was plaintiff an exempt

employee under the Fair Labor Standards Act?

MR. LIFSON: Yes, sir.

THE COURT: There's no question about that really?

MR. LIFSON: Well, I didn't think there was a question on that for the following reason. Mr. Schmidt accepted a position and signed -- electronically signed a work assignment form that specifically stated his position was IT exempt.

When he was deposed he was asked, were you -- did you accept an exempt position? He answered yes, I did.

THE COURT: Of course, that's not the end of the inquiry. But the indicia are he was a computer professional and performed the type of work set forth in the exemption?

MR. LIFSON: That's right. And there's no dispute from the plaintiff that he met the duties portion of the exempt position. So, the only question is was he paid in a way that met the exemption, as I understand the argument.

THE COURT: Now, as he filed suit for overtime pay or is it for straight time?

MR. LIFSON: For straight time, Your Honor. And that also goes to the reason why he doesn't -- he has

not articulated an FLSA claim because the only relief he seeks is for straight time. And that's calculated both in his complaint. It's calculated in his Rule 26(a)(1) disclosures and also in his deposition, he was explicitly asked in this case, are you seeking time and a half or straight time? And his answer was straight time. And that's actually in -- on page 142 of his deposition which is attached as Exhibit 1 to our opening brief.

THE COURT: Now, am I clear that the plaintiff here did not tell anyone at Verizon about these additional hours nor reported these hours to Bartech Group; is that right?

MR. LIFSON: Exactly, Your Honor. Mr. Schmidt was employed in this position from June 2012 until February of 2013. At no time did he -- and the way he submitted his hours were -- into an electronic system called Pace which goes into Verizon on a weekly basis. Verizon then approves his hours. Then they get sent to Bartech to be paid.

THE COURT: So to be clear, the employee has an obligation to report -- self report his own hours?

MR. LIFSON: Exactly. There is no clocking in or out. There is no supervisor who is monitoring his time. It is a weekly timesheet submittal to the people that he's -- that he's working for.

THE COURT: So then, he never reported to Bartech or Verizon, so how would we know what the 84 hours are? Where did that number come from? Is it from two weeks, one week, ten weeks? Where do we get the number from?

MR. LIFSON: It comes from the entire duration of his employment. And this is an allegation that Mr. Schmidt has made. We really have no way of checking it.

He testified that he kept a paper journal in which he wrote down the extra hours he worked, and once -- when he started the case that's how he came up with the calculation. I think it's 84 and a half hours over the entire duration of his employment.

Now, there's one small exception to whether he reported extra hours and that's the following.

THE COURT: The first timesheet.

MR. LIFSON: In the very first timesheet, he reported an hour and a half which now he says it was actually three hours, but he felt bad about putting that many overtime hours on his first week, so he only reported an hour and a half.

And it's also important also where that -- how that reporting occurred. And that reporting went in the pay system. It showed up as an hour and a half of

extra time. And his -- one of his supervisors told him, wait a minute, you know you're supposed to get pre-approval for overtime hours. You did not get pre-approval for overtime hours. So we're going to reduce this timesheet to 40 hours because you did not obtain that approval. And that is the timesheet that went to Verizon electronically to be paid.

There was a backup copy that he e-mailed to -- to Bartech, but all the testimony was that the only way those backup timesheets ever get looked at is if there's some kind of mess up in the electronic submissions.

THE COURT: So what is the Fair Labor Standards Act claim here?

MR. LIFSON: Well, that's a good question, Your Honor. The -- the Fair Labor Standards Act claim is there's Count I and II which are both based on the Fair Labor Standards Act. And our position is that based on the undisputed evidence and the testimony that there simply is no claim under that act based on the fact that he -- in dispute and agreed that he accepted an exempt position, and that he's not even seeking an FLSA remedy. He's seeking a straight time remedy which is a contract remedy. It's not an FLSA remedy.

THE COURT: Well, address the contract issue

if you would. I want to understand your view of the -- why it's insufficient.

MR. LIFSON: Sure. The -- turning to the contract claim, the claim is, as I understand it, is fairly simple that Mr. Schmidt says I was to be paid $47.50 for every hour I worked. You didn't pay me for these extra 84 and a half hours I worked. Therefore, you owe me that money.

Our response to that is that -- and we've cited a case in our reply brief which says the following. That is, "What is necessarily implied in a contract is as much a part of the instrument as if plainly expressed and will be enforced as such". And that's the Fourth Circuit *Litman* case from 2008. And that just states a commonly-known contract principle.

Now, perhaps the most fundamental thing that was at least implied in any contract between Mr. Schmidt and Bartech is his obligation to timely and truthfully and accurately report the hours he was working. Because even as Mr. Schmidt himself testified, if he failed to do that, there is no way for either Bartech or even Verizon to know that he was working those hours.

And Mr. Schmidt also testified that because he did not report those extra hours, he did not expect to be paid for them, which raised the question why did

you -- why did you bring the suit?

But pertaining to the contract claim, he knew his obligation was to timely and accurately record the hours. He knew it from common sense. He also knew it from the employee handbook that he acknowledged receiving and reading at the same time that he signed on to accept the job. And that employee handbook on page 32 explicitly emphasizes the importance of accurately and timely reporting his hours, specifically prohibits off-the-clock work and makes it abundantly clear to the employee that is what his obligation is.

And he admitted that he never reported those hours. And he also admitted he never even requested authorization to work the overtime hours. So there's absolutely no way for either Verizon or for Bartech to know that he was working these hours until he winds up resigning and then submits this claim for all these additional hours he claims to have worked.

THE COURT: I've asked you the questions I have about the FLSA and contract. Let me hear from Ms. Connolly.

MR. LIFSON: Thank you, Your Honor.

MS. CONNOLLY: Thank you, Your Honor. If I could just frame the issues that I'm addressing for the Court today.

THE COURT: That would be very helpful.

MS. CONNOLLY: It is whether there has been a prima facie case stated on the undisputed facts that are in evidence before you as to Mr. Schmidt's anti-retaliation -- violation by either Bartech or Verizon of the anti-retaliation provision of the FLSA and whether he stated a claim and has enough evidence in the record to proceed on his wrongful discharge claim under the *Bowman* exception which is a Virginia law state claim.

So, that's sort of the issue that I'm here to address. But before I dive into that, I just wanted to add to something that Mr. Lifson addressed to Your Honor's question about the first timesheet and the hour and a half.

We don't actually have any evidence in the record before you that anybody in Verizon actually went in and changed that timesheet. We have purely Mr. Schmidt's supposition that that has happened. There's been no deposition testimony in fact that that has taken place. So what we have is in the Bartech record a screen shot of a timesheet reporting an hour and a half above 40 on the first week and nothing else. It doesn't show up in the Verizon record it's 40 hours in the Verizon records for that particular workweek. And we're not exactly clear on how that happen. That answer

has not been addressed in discovery.

THE COURT: All right.

MS. CONNOLLY: It's not a dispute of fact. It is just to be clear what the record is before Your Honor.

Now, the *Bowman* claim and the retaliation claim in the FLSA are two distinct legal claims, but they fail for the same factual reason, Your Honor. And that is, Mr. Schmidt did not engage in anything that could constitute protected activity under the purview of the statute, nor could he be deemed to have been exercising any statutory right which would be deemed in the public policy of Virginia sufficient to support a claim under the *Bowman* exception to the at-will doctrine.

THE COURT: But, was his e-mail a complaint?

MS. CONNOLLY: Well, I think that's exactly the key question, Your Honor. I think there's no dispute between the parties that the February 1st e-mail in fact would be dispositive of this issue.

And we've attached the e-mail as Exhibit 19 to our papers. And I'm sure Your Honor has had a chance to look it.

THE COURT: I've had a chance to parse it. I guess the question is whether the e-mail, which was in response to a request by Ms. --

MS. CONNOLLY: Hajdo.

THE COURT: -- Hajdo to do extra work or do work over the weekend, whether his response to that was a protest that he was being asked to do overtime without pay.

MS. CONNOLLY: Well -- and I think that's exactly what the key question is here. And if you look at the plain language of his e-mail what he is saying is, I am not willing to, in the future, continue working on this contract if Verizon is unwilling to approve and pay for overtime.

What he is not saying in the four corners of this e-mail is in the past, I have worked in excess of 40 and I haven't been paid for it, and I insist that you pay me for it.

THE COURT: It doesn't say that does it?

MS. CONNOLLY: It certainly doesn't say that, Your Honor. It's at Exhibit 19.

And the standard that Your Honor should be considering here in whether this constitutes protected activity under the purview of the statute is articulated in the *Kasten* case. So this is U.S. Supreme Court authority, and if you just bear with me a moment, it's at 1335 of the *Kasten* case.

And it provides "to fall within the scope of

the anti-retaliation provision of the FLSA, a complaint must be sufficiently clear and detailed for a reasonable employer to understand it in light of both the content and the context as an assertion of rights protected by the statute and a call for their protection".

So that's the standard as to whether or not protected activity has been engaged in.

And the undisputed facts before you, Your Honor, as Mr. Lifson already walked through with you is he never once, other than possibly that first week reported anything in excess of 40. He admits that nobody is monitoring the amount of time he is working. At Verizon no one is doing this, nor is anybody doing this at Bartech.

THE COURT: And he was told the first time he submitted the overtime that it was not allowed under the contract. So he knew that going forward that you're not supposed to claim overtime without authorization.

MS. CONNOLLY: That's precisely right. I think to clarify your point, Judge, there was a discussion between him and his supervisor, not in connection with his first timesheet but more generalized discussion which happened several weeks later as to whether overtime would be approved and he was told categorically no.

And in fact what's in the record and what Mr. Schmidt even admits is Mr. Schmidt said, what do I do if I'm in the middle of a project and I hit my 40? And he was told you go home. You go home. There's no overtime permitted here.

So, there's no question, Your Honor, that there was no way that either Verizon or Bartech could have known if he was actually working in excess of 40. He never reported it. There was no situation which would have given rise to these individual -- individual employees within Verizon or the folks in Bartech to know what he was doing. And yet, he is asking this Court now to construe his February 1st e-mail as an assertion of some FLSA protected rights even though he doesn't say that and he's speaking aspirationally about what his expectations are for the future.

So, for that reason, Your Honor, this e-mail does not constitute protected activity under the scope of the statute nor does it constitute an assertion of some statutory right under the Virginia Code.

THE COURT: Well, he had been paid for the hours he submitted timesheets for at that time, so he wouldn't have had any unpaid wage claim at that time; is that right?

MS. CONNOLLY: That's correct. There's no

dispute that he was not paid as to the 40 that he submitted.

THE COURT: All right.

MS. CONNOLLY: So the issue would be whether there were additional hours that he wasn't paid in violation of 40.1-29. And that's simply not what his e-mail says.

Now, even if Your Honor was to disagree with defendant's position as to what this undisputed February 1st e-mail actually means and you would view it as some protected activity or assertion of some FLSA right, there's no question that he suffered no adverse action as a result of sending this e-mail.

And, the reason why is simple. In the same e-mail where he is allegedly asserting his complaint, he's simultaneously resigning. He specifically says to Ms. Hajdo -- sorry, I'm trying to put my finger on it. But he simultaneously says, see what you need to do to put somebody else on this contract.

Every single person who received this e-mail in February of 2013, whether we're talking about Ms. Hajdo directly or to the individuals who Ms. Hajdo forwarded it to testified in discovery that they understood his e-mail to constitute a resignation.

THE COURT: Well, didn't he send an e-mail to

Ms. Hajdo suggesting someone else for the job?

MS. CONNOLLY: He did, and that's actually part of our exhibit, number 19 as well. And that's on page RS-27 of Exhibit 19 at the top.

THE COURT: Are you referring to your brief -- in your initial brief?

MS. CONNOLLY: The opening brief, Your Honor. It's Exhibit 19 at page RS-27 is where you'll find that.

THE COURT: All right.

MS. CONNOLLY: So, Your Honor, there is no question what the undisputed fact and discovery establish. Yet, Mr. Schmidt is asking this Court to disregard that competent testimony of three witnesses as to what their understanding was contemporaneously with receiving this e-mail and instead credit his subjective belief that either they're lying now as to their understanding of what this e-mail was or that he didn't really mean to resign in sending this e-mail. Instead he was simply blowing off steam about it and was trying to negotiate the terms of a renewal of his contract.

There's no --

THE COURT: Well, he said -- suggest someone else to replace him. Doesn't that suggest that he was done?

MS. CONNOLLY: In our view, absolutely.

THE COURT: Okay. Thank you.

MS. CONNOLLY: Thank you.

THE COURT: Let me hear from Mr. Cook.

MR. COOK: Thank you, Your Honor. John Cook on behalf of plaintiff, Mr. Schmidt.

There are two separate claims here. The smaller claim is over the $4,000 for the unpaid time. But really the crux of the case, the larger claim is the retaliatory discharge claim because we're talking somewhere over $150,000 in loss pay from having lost that job. So, if it pleases the Court, I'm going to focus on that retaliatory discharge claim initially.

I think Your Honor asked the -- exactly the correct question, which is, is this e-mail a complaint under the FLSA? And, it is.

It is not a resignation as suggested by the defendants. And let me just sort of parse through that a little bit. If any reasonable person were to look at this e-mail thread and say, gee, I don't know if that's a resignation. Boy, I'm not sure. It's a little vague. It's a little ambiguous. Then for purposes of today's motion, the motion must be denied because we're here at summary judgment, and it is the defendant's burden to prove that no reasonable juror could find that this e-mail is anything other than a resignation.

And, I suggest it's not nearly that clear at all.

THE COURT: Well, where in the e-mail do you suggest that he is telling Ms. Hajdo or Lisa, that he is complaining about prior FLSA violations?

MR. COOK: He's complaining about a contemporaneous FLSA violation, and let me explain that.

The e-mail chain, the relevant part starts with Ms. Hajdo's e-mail at 12:58 p.m., the paragraph that -- I'm sorry, the -- yes, and where she says, a hard stop after 40 hours isn't really going to work in the long-term either. I know it's a contract claim, but you can't just not fix a problem because your 40 hours are up.

What she's saying is in the long-term, meaning to work here, including this weekend and beyond, contemporaneous time, she's asking him on a Friday to do some work. You must work over 40 hours, and we know he's not going to get paid. We know Mr. McCarthy told him first time out beginning of his time there, you're not going to get paid for hours over 40. Mr. McCarthy said the exact opposite of Lisa. He said, you stop at 40. You get up. You walk away. You're done.

THE COURT: If you would go back to my original question which was where in this e-mail or even

Ms. Hajdo's e-mail do you see him complaining that he has done work in excess of 40 hours for which he was not paid overtime?

MR. COOK: That particular question he doesn't say. What he says is in his --

THE COURT: Well, she doesn't say it either, does she?

MR. COOK: No, what she says is --

THE COURT: Let me finish my point. My point is if you're complaining about not being paid for overtime, in this case, he is not alleging that he was told to work overtime without pay. And there's nothing here in the e-mail chain to suggest that. Is that right?

MR. COOK: No, I disagree. He is --

THE COURT: Well, show me. You have the e-mail there. I have it in front of me. Where does it say that he worked 40 hours. She's telling him in the future if you want to keep this contract, then you have to be able to have connectivity from home, and you can't just stop fixing the problem because you're 40 hours are up.

MR. COOK: Right, not just in the future, but that day, right. Remember, what starts this is she says I want you to run these programs tonight. He said I'm leaving at 3 o'clock and she says, you know, hard stop at

40 hours aren't going to work. So, today, as your boss, I'm telling you to work over 40 hours, even though we know you're not going to get paid. And he says, I'm not going to do it.

Right. So, here's the response which is, you know, I'm not going to work over 40 hours if I'm not going to get paid. But he says, if Verizon is willing to approve and pay for overtime, this is a quote, then I'll certainly do what is needed after the 40.

He's not resigning. He's saying provided I'm going to be paid under the law and under my contract, I will do the work. Because what Lisa is telling him is that he should give up his rights. She's saying you should work over the 40. You should work tonight, this day, and not get paid.

THE COURT: I've read what you just said. There's no complaint here about prior overtime being work without pay. Do you agree with that?

MR. COOK: That's correct.

THE COURT: And in this instance, he was being asked to upload some software over the weekend and he's complaining that I'm not going to do it unless I'm paid. And then he says -- and this is the part that I want you to address and that is where she asked him about -- he says, "I don't have to think hard at all",

ellipsis, "talk to O'Neil about contacting Bartech to cancel the contract or request that Bartech find a replacement for me".

How -- what does that mean to you?

MR. COOK: That's the first part of the thought that he's conveying in this e-mail. The second --

THE COURT: When she told him about doing the work and he says "I don't have to think long at all about that. As a matter of fact, contact Bartech to cancel the contract or request that Bartech find a replacement for me. And I'll also contact Bartech to advise them of your concerns".

Is that a resignation to you?

MR. COOK: No, because you've only read half of what you said.

THE COURT: The whole thing is in front --

MR. COOK: And I realize that. But what I'm saying is you can't parse it that way. Because his message isn't I'm not going to work. His message is, when you read both paragraphs together, is if you're telling me to work without pay, I'm not going to do it. Get somebody else. But if you're telling me you're going to pay me, I'm willing to do the work.

That's a perfectly reasonable thing for

anybody to say. And so, he's not saying I resign tonight. He's saying, if you tell me to do work without pay, my answer is no. I don't need to think about it. He says my answer is no.

Now, if you're telling me you're going to pay me -- and remember, the history here. He's already been told by his boss no hours over 40, and he already had a circumstance where he did work over 40 and his timesheet got changed. So there's a con -- a concept here, a context. And he says --

THE COURT: Would you also address the same day, February 1, at 2:30 p.m., "perhaps the former co-worker who Verizon contract was canceled into 2012 would best suit your needs. He's very intelligent, good with SAS and has connectivity from home and is just a few minutes from the Ashburn campus".

So this is a few minutes after his 2:21 e-mail. So you're saying that his suggesting someone else to replace him is not -- should not confirm he's quit?

MR. COOK: What he's saying is there are two paths here. If you're -- if your path, Verizon, is you want me to work without pay, I'm not going down that path. If you're going to pay me like the law requires you to, great, ready to do it. And then he says, and,

hey, if you're going to go down the path of violating my rights which I said I'm not going to do, maybe, you know, you can ask this guy if he wants the job.

So you have to put these comments into context. There's a fork in the road, and one fork is a violation of the law and the other is that his rights are honored. And he says --

THE COURT: Yogi Berra said when you come to the fork in the road, take it.

MR. COOK: That's right.

THE COURT: I don't think we have that here.

MR. COOK: What we have is Mr. Schmidt saying I'm ready to continue working provided I'm paid like the law says I'm supposed to be paid. And Verizon is saying through Ms. Hajdo, essentially, I want somebody who is going to work without getting paid. And, that's the --

THE COURT: I don't think she wanted someone who would work without getting paid. She said -- and maybe it's just me. She seems to suggest that an IT professional should have connectivity at home and that he doesn't, which is to her a problem for being able to access the system and to fix it.

And many -- I don't want to go any further than that. That's what I just read out of this.

MR. COOK: And then when you go on, when she

says a hard stop at 40 isn't going to be possible.

THE COURT: Well, when the system goes down, Mr. Cook, what happens? He's just to wait until the next 40 hours for the repairs to begin.

MR. COOK: That's up to Verizon. They can pay him to do the work or they can have him wait. Mr. McCarthy told them wait. Mr. McCarthy said when your 40 hours are up, you walk out the door.

THE COURT: The whole thing is unclear to me and that is did he set his own schedule or did he have a time clock schedule? I had the impression he worked from 7 to 3. That was by his choice because of his commute. That wasn't because Verizon told him, go the 40. So, then in other words, his availability was determined by -- he determined himself. And so he decided what hours he would be available. So he could work 40 hours on Saturday on Sunday as long as he worked no more than 40 hours in the course of a week; is that right?

MR. COOK: Nobody at Verizon or Bartech told him this is the hour you must clock in, that's correct. Now, of course, on this particular day, it's Friday. The week's up. He has hit his 40 hours.

So, there's some suggestion in the deposition testimony that well, you know, he can just massage his schedule to not go over 40. But what we're seeing in

this particular e-mail, which is the crux of the whole case is Ms. Hajdo saying, hey, you know, if the work is needed, I expect you to work over 40 hours.

And Mr. Schmidt's looking at that next to Mr. McCarthy who said, you're not getting paid over 40 hours and I expect you to walk away at hour 40, period. And so what Mr. Schmidt is saying, and Mr. Schmidt has the experience of having gone over the 40, his first week or two there and not getting paid.

THE COURT: He did so without authorization. Is there anything in this e-mail chain to suggest he could not go back to Bartech and get authorization for overtime?

MR. COOK: Not in this chain, but Mr. McCarthy's testimony -- the testimony -- Mr. Schmidt's testimony was they told me don't ask. We don't give it. So that's the context.

THE COURT: All right. Well, let me ask you now to focus if you would on the FLSA claim because I think I understand your retaliation argument. You're asking for just straight time, not overtime?

MR. COOK: That's correct. That's correct.

THE COURT: All right.

MR. COOK: And what we -- and, when I read the defendant's reply brief, because they seem to get

into this overtime issue. So I went back to look at our brief and just to see the source of that confusion.

The term overtime is used by the fact witnesses in the case to represent hours over 40.

So, as lawyers, we say, oh, you're asking for time and a half. That's not what people were talking about. It's all straight time.

But, it is true, and it's not a legal issue that we have to resolve for this case. But, you lose your exemption or the company losses its exemption for you if they don't pay you in accordance to what the exemption requires.

So, you may be IT exempt. Two things have to happen for you to be IT exempt. You have to have the job duties which everyone acknowledges Mr. Schmidt had, and you have to be paid at least 27.50 an hour for every work you work, including hours over 40.

So, if you're not paid, then all of a sudden, that raises the issue is the exemption gone. Just like in a salary case where you have an exempted salary employee and there's a partial day absence where they're docked. And what the law says is once you've docked a partial day absence, you've converted that person to hourly. They've loss the exemption. Now they're paid time and a half.

So why that is all relevant here is that that shows that this discussion is related to the FLSA. The discussion about am I going to get paid for my hours over 40? The discussion about gee, if I'm not paid am I losing my exception? Those questions are related to the FLSA. And what the retaliation provision of the FLSA says if you make a complaint, and I think a jury can certainly find that this is a complaint. I don't want to work over 40 hours and not get paid.

If that complaint is related to the FLSA, then, you have made -- that's protected activity and that's what's happened here.

If Mr. Schmidt had said I don't want to work and not get paid, on the facts, he is saying, I want my rights honored. I want to get that straight time over 40. And the company says you're out of here.

THE COURT: All right.

MR. COOK: Retaliatory action.

THE COURT: All right. Thank you very much.

MR. COOK: Thank you, Your Honor.

MR. LIFSON: Your Honor, I only have two points to make in response to what Mr. Cook has said.

Mr. Cook just said you can lose the exemption if you're not paid to the extent that the exemption requires.

Well, the exemption here requires that an IT exempt employee be paid $27.63 per hour. And there is no dispute here that even if we give Mr. Schmidt credit for all of the hours over 40 that he claims to have worked, his compensation was way above that figure.

But, the point that we made in our reply brief is that the Court doesn't even need to get to that analysis because as Mr. Cook confirms, Mr. Schmidt is not seeking a FLSA remedy. Therefore, it's not a FLSA claim. It's not a FLSA case. It's a breach of contract case.

And the only other point in this pertains to the retaliation claim. There are really two retaliation claims, one under *Bowman*, one under the FLSA. But if there's no FLSA claim, there can't be retaliation claim under the FLSA either, Your Honor.

THE COURT: All right, thank you very much.

MS. CONNOLLY: Your Honor, I too just have two points to address based on what Mr. Cook said in his argument.

If I heard him correctly, I think what he is espousing to you is that somehow this February 1st e-mail attached as Exhibit 19 to our opening brief really was an assertion of an FLSA protected right because in his view, Lisa Hajdo was asking him to work above 40 on that day. Mr. Cook said today. She was asking -- she was asking

Mr. Schmidt to do this today.

But, if you look at the e-mail string and you look at the 12:58 p.m. e-mail from Ms. Hajdo back to Mr. Schmidt, what she says to him in response to him saying I'm over 40. I was planning to leave at 3:15 today is I'll do it tonight.

So, there is no insistence in this e-mail string that no, I've heard that you've hit your 40 and I'm insisting that you stay. She backs off and says, I've got it.

So I just wanted to clarify, Your Honor, that that new argument that we heard does not convert this e-mail string into a protected activity encompassed by the statute.

THE COURT: All right, thank you very much.

MS. CONNOLLY: May I just address one more point, Your Honor --

THE COURT: Yes.

MS. CONNOLLY: -- as to resignation?

Just to address what Mr. Cook said, I think what he submitted to you is this ambiguity to the extent there is one around whether he resigned needs to be submitted to the jury. That's not the relevant inquiry. It's what the witnesses understood it to be at the time that they received it, which informed their subsequent

action.

THE COURT: What you're saying is what management thought the e-mail meant.

MS. CONNOLLY: Exactly. And there's no dispute about that.

Thank you, Your Honor.

THE COURT: Thank you.

All right. Counsel, this matter requires a written opinion. So I'll issue a written opinion, and I thank you for the quality of your participation.

You're excused. Thank you.

MR. LIFSON: Thank you, Your Honor.

(Proceeding concluded at 11:09 a.m.)

CERTIFICATE OF REPORTER

I, Renecia Wilson, an official court reporter for the United State District Court of Virginia, Alexandria Division, do hereby certify that I reported by machine shorthand, in my official capacity, the proceedings had upon the motions in the case of Robert Schmidt vs. Bartech Group, Inc., et al.

I further certify that I was authorized and did report by stenotype the proceedings and evidence in said 31, and that the foregoing pages, numbered 1 to 32, inclusive, constitute the official transcript of said proceedings as taken from my shorthand notes.

IN WITNESS WHEREOF, I have hereto subscribed my name this 8th day of January, 2015.

/s/
Renecia Wilson, RMR, CRR
Official Court Reporter